IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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JAVA COCOANUT OIL COMPANY, LTD. (a corporation), *Plaintiff in Error,* vs. FIDELITY AND DEPOSIT COMPANY OF MARYLAND (a corporation), *Defendant in Error.*	No. 4125
JAVA COCOANUT OIL COMPANY, LTD. (a corporation), *Plaintiff in Error,* vs. GLOBE INDEMNITY COMPANY (a corporation), *Defendant in Error.*	No. 4126

BRIEF FOR PLAINTIFF IN ERROR.

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STATEMENT OF THE CASE.

These are two writs of error to the District Court for the Southern Division of the Northern District of California. The plaintiff in error, Java Cocoanut Oil Company, Ltd., a New York corporation, brought two actions in the District Court, one against Fidelity and Deposit Company of Maryland, the defendant in error in the

case numbered 4125 in the records of this court, and the other against Globe Indemnity Company, the defendant in error in the case here numbered 4126.

Each of the defendants had executed an attachment bond on behalf of one Warren R. Porter, as plaintiff in litigation which Porter had instituted in the District Court against the Java Company, the plaintiff here. The bond given by the Fidelity Company was posted in an action by Porter numbered 16,430 in the District Court, and the bond given by the Globe Company was posted in a similar action numbered 16,452. The two actions now before this court were brought on these bonds.

Both cases arise on substantially similar facts. Pursuant to written stipulation of the parties (Tr. pp. 20, 155) the two cases were tried together by the District Court without a jury (Tr. p. 31). By order of this court, the records in both cases have been printed under one cover, and the two causes consolidated for briefing and argument.

Both cases involve the same main question—whether attorneys' fees expended by a defendant in defeating an action can be recovered as damages from the surety on the attachment bond of the attachment plaintiff, it appearing that the attachment was regular on its face and could not have been dissolved except by successfully defending the case on its merits. Upon submission of the case the District Court, the Honorable George H. Bourquin presiding, held that such attorneys' fees are not damages caused by the attachment (Tr. pp. 22-26),

and that they cannot be recovered from the surety, although Honorable Frank S. Dietrich had previously overruled the defendants' demurrers to the amended complaints, and had held, in effect, that such attorneys' fees are recoverable (Tr. pp. 13-15).

There are several collateral questions besides the main question in the cases—for example, whether the liability of the surety is destroyed by the fact that the attachment defendant recovers on a counterclaim or cross-complaint, or by the fact that he posts a forthcoming bond to reobtain the attached property from the custody of the law. To these and other incidental questions we shall later on refer.

Both the amended complaints are in two counts. The second count in each case is for attorneys' fees. The recovery prayed on this count is $15,000 in the action against the Fidelity Company and $10,000 in that against the Globe Company (Tr. pp. 5, 142). The first count in each case prays the recovery of costs taxed in favor of this plaintiff in the Porter litigation (Tr. pp. 1, 139). The District Court held the plaintiff entitled to recover such costs (Tr. pp. 26, 20, 156) and entered judgment accordingly (Tr. pp. 20, 156). Neither of the defendants has taken out a writ of error; indeed, with what the trial court characterized as "A magnificent gesture" (Tr. p. 26), they expressly conceded that, as to the costs, the plaintiff was entitled to recover (Tr. pp. 25-26). A "little more this exuberant generosity and lordly spirit," the court observed, and "plaintiff's demands might have been paid in full without litigation" (Tr. p. 26).

The District Court first considered the question as to the defendants' liability for attorneys' fees in passing upon their demurrers to the amended complaints (Tr. pp. 10, 147).[1] Each amended complaint (Tr. pp. 1, 139) sets forth in substance that Porter brought an action against this plaintiff; that the respective defendant posted in such action an attachment bond on Porter's behalf; that the bond obligated the defendant, if Porter failed in his suit, to "pay all costs that may be awarded to the said defendants[2] or either of them and all damages which they or either of them may sustain by reason of the said attachment"; that on the strength of the bond Porter procured an attachment against the property of the plaintiff; that the various cases between Porter and the plaintiff were consolidated and tried; that this plaintiff, the defendant in the Porter cases, prevailed over Porter and recovered a judgment against him for $494,498.30 and costs. It was further alleged in each amended complaint that, in order to dissolve Porter's attachment, it was necessary for this plaintiff, as defendant, to defend on the merits the suit in which the attachment issued, and that the plaintiff paid its attorneys for defending such suit and so procuring the dissolution of the attachment, the amount prayed as damages from the surety.

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(1) The defendants had previously moved the court for an order directing the complaints, as originally filed, to be made more definite and certain. The court granted these motions, but did not pass upon the question whether the defendants were liable for attorneys' fees.

(2) The reason why the bonds read in the plural is Porter had joined as a party defendant with the Java Company, another corporation, the Oliefabrieken Insulinde, N. V. This corporation was not served with process and did not appear in any of the litigation here involved (Tr. p. 101).

Judge Dietrich overruled the demurrers (Tr. pp. 13, 150). The amended complaints, he decided, were "reasonably clear, and in each cause of action the facts pleaded are sufficient to entitle the plaintiff to relief" (Tr. pp. 14, 150-151). In amplification of this ruling he said (Tr. p. 14):

> "By so holding I am not to be understood as foreclosing certain questions discussed by the defendant partly upon the assumption of facts appearing only by remote inference or in the records of the attachment cases. Those questions, it is thought, can be more safely answered when the evidence is in. The plaintiff has not seen fit to exhibit in full the records in the attachment cases, but has pleaded sparingly and cautiously, as is its right. Some of the essential averments may be difficult of proof, but at this juncture we are not at liberty to consider whether plaintiff will be able satisfactorily to establish the truth of its averments. *It has specifically alleged that, to procure the dissolution of the attachment upon which the bond in question was given, it was necessary for it to defend the action upon the merits, that plaintiff employed for such purpose a law firm, and that this firm represented it in such defense, which, as already suggested, it claims it was necessary to make for the purpose of ridding itself of the attachment.* It is further clearly claimed that the services for which the plaintiff now seeks reimbursement were rendered in the action in which the bond was given, and not in any other action, and were rendered subsequent to the issuance of the attachment and to secure its dissolution, and that the sum paid for the services was without any reference to services rendered in others of the consolidated suits.
>
> Defendant now argues that under all the circumstances it must be apparent that the services were rendered primarily in defense of the suit, and that

> the dissolution of the attachment was a mere incident. That may turn out to be true, but such a theory is not in harmony with the allegations of the pleading."

The decision on the demurrers thus involves, we think, a clear-cut ruling that attorneys' fees expended in defeating a claim on its merits are recoverable damages on an attachment bond, if, as here, the party attached cannot otherwise rid himself of the attachment.

The cases came on for trial before Judge Bourquin (Tr. pp. 30-31). In the meantime the defendants had stipulated that the respective amounts prayed by the plaintiff as attorneys' fees were, as the amended complaints alleged, the reasonable value of the services rendered by the plaintiff's attorneys *after* the levy of Porter's attachments, in *defending* his respective suits against the plaintiff (Tr. pp. 32-35). The evidence, introduced to support the remaining allegations of the amended complaints, was undisputed. The defendants introduced no evidence except the records in the Porter suits (Tr. p. 106 et seq.).

Judge Bourquin wrote an extensive opinion (Tr. pp. 22-26), deciding that the plaintiff could not recover attorneys' fees. In so deciding he expressed views which, we think, are at variance with the previous ruling of Judge Dietrich. Judge Dietrich had held that attorneys' fees for defending a suit on its merits might be recovered on the attachment bond. Judge Bourquin decided otherwise. The defendants' theory that attorneys' fees "paid in respect to the attachments alone",

he said, "and not those paid in respect to the merits of the action, are damages 'by reason of' the attachments and for which sureties are liable, is the better rule, sound in principle, sustained by superior authority, and further locally justified by analogy" (Tr. p. 23).

Although Judge Bourquin thus held that attorneys' fees "in respect to the merits" cannot be recovered upon an attachment bond, he concluded his discussion of this subject with a statement not strictly consistent, as we believe, with his own prior ruling. He said (Tr. p. 25):

> "Attorneys' fees as costs or damages are not favored and are recoverable only when with clear support in contract or statute. *Plaintiff not having segregated fees for services due to the attachments from those due to the trial of the action, can not recover for them. It may be on sufficient data an allowance might be made by the Court, but apparently plaintiff seeks all or none.*"

The plain implication of this statement, we think, is that the plaintiff was entitled to recover something, but could recover nothing because it had prayed too much. Clearly, we think, the court, under its own ruling, should have made the allowance to which the plaintiff was entitled. All the necessary facts were before the court, because, as we said, the defendants had put in evidence the whole record of the Porter suits.

The situation, in other words, is that, although the evidence supporting the allegations of the amended complaints is uncontradicted, the judgments allow the plaintiff nothing on its second causes of action, despite

Judge Dietrich's decision that the facts pleaded were sufficient to support a recovery, and despite Judge Bourquin's ruling that, while the plaintiff had asked too much, it was nevertheless entitled to some allowance.

We believe that, by the great weight of authority, attorneys' fees for dissolving an ostensibly valid attachment, by defeating the attachment plaintiff on the merits of his case, are damages recoverable on an attachment bond. Clearly, therefore, we submit, since the defendants have stipulated that the amounts prayed are the reasonable value of the services of the plaintiff's attorneys in defending the attachment suits, the plaintiff is entitled to judgments for the amounts prayed in the amended complaints.

Before referring to the authorities, we call the court's attention to the prior litigation between Porter and this plaintiff. That litigation is, of course, the basis of the cases at bar, and it would therefore, we think, make for a clearer understanding of these writs of error if the court were, at the outset, apprised in a brief way of the essential facts concerning it.

There were four actions in the District Court between Porter and the plaintiff, numbered, respectively, 16,430, 16,452, 16,498 and 16,518 (Tr. pp. 108-112). Porter was the aggressor in the litigation and he commenced the first two of these suits, praying the recovery of $172,-166.25 in number 16,430 and $127,500 in number 16,452 (Tr. pp. 109-110). These were the suits in which the defendants posted the bonds here in suit. The second two suits were commenced by the plaintiff against

Porter, and they were respectively, for $22,342.50 and $65,826.68 (Tr. p. 111). The plaintiff also interposed a cross-complaint and counterclaim in each of the two actions commenced by Porter (Tr. pp. 109-110). In action number 16, 430 the plaintiff's cross-demand was for $189,431.93 (Tr. p. 109) and in action number 16,452 for $219,374.39 (Tr. p. 88).

All the Porter cases arose out of the same transaction and involved substantially similar issues (Tr. pp. 68-69). They were consolidated (Pl. Exh. 3, Tr. pp. 67-68) and tried before a jury. The trial lasted some three weeks. More than seventy witnesses were examined (Tr. p. 79). The jury decided against Porter and returned a verdict in favor of this plaintiff for $494,498.30 and costs—practically the whole amount claimed (Tr. p. 86). The judgment entered on this verdict is still unsatisfied in an amount exceeding $450,000 (Tr. pp. 4, 16).

The litigation involved claims for breach of warranty asserted by Porter and claims for goods sold and delivered and for damages asserted by the plaintiff, arising out of contracts between the parties for the purchase and sale of copra cake. The plaintiff in 1920 was importing copra cake from Java, and Porter was engaged in selling it as stock food among the cattlemen (see Tr. p. 83). During the spring and early summer of 1920 Porter made five written contracts to buy cake from the plaintiff (Tr. p. 68). The total price of the cake thus purchased was about a million dollars (Tr. p. 81) and the contracts provided for installment deliv-

eries at approximately monthly intervals through the period from July, 1920, to January, 1921 (Tr. pp. 74, 84).

By July, 1920, or thereabouts, the plaintiff had delivered to Porter copra cake worth at the contract prices some $190,000 (Tr. p. 75). This cake Porter had accepted but not paid for. In the meantime the chaotic deflation period of mid-1920 had begun. Foreign trade came almost to a standstill. Copra cake wavered, weakened and slumped heavily in price (Tr. p. 84). Porter then refused to pay for the cake already delivered, claiming that it was not up to warranty (Tr. p. 83). Indeed, though he had accepted nearly $200,000 worth of cake, resold it and pocketed the proceeds, he claimed that he had sustained loss by the plaintiff's alleged breach of warranty, and he threatened the plaintiff with suits for damages.

Matters were in this condition early in August, when the plaintiff's attorneys were employed (Tr. p. 74). These attorneys strongly advised that the difficulties between the parties be compromised (Tr. p. 79). Overtures to this end, however, came to nothing, and on August 28, 1920, Porter filed the first suit, praying $143,566.25 damages for breach of warranty (Tr. p. 109), an amount later increased by an amended complaint to $172,166.25 (Tr. p. 110). On September 10, 1920, the plaintiff filed its counterclaim and cross-complaint (Tr. p. 109).

During the months that followed installments of copra cake covered by the contracts kept arriving from Java

in San Francisco (Tr. p. 85). As each lot arrived the plaintiff tendered it to Porter and Porter as consistently refused to accept it (Tr. pp. 89-90). This continued until January, 1921, when Porter definitely repudiated all the contracts and refused to accept further deliveries (Tr. p. 90).

Porter meanwhile, on October 1, 1920, had commenced his second suit against the plaintiff (Tr. p. 110). The plaintiff rejoined with a cross-complaint and counterclaim (Tr. p. 110) and subsequently on January 19 and February 23, 1921, respectively, filed its two affirmative actions against Porter (Tr. p. 111).

During the early stages of the litigation the thought of settlement was renewed from time to time (Tr. p. 81). All idea of compromise ended, however, with Porter's first attachment on December 6, 1920 (Tr. pp. 81, 109). This attachment tied up, among other things, the cocoanut meal (Pl. Exh. 1, Tr. pp. 40, 46) which the plaintiff had ground from the rejected copra cake, in a strenuous effort to move the cake, despite the demoralization of the market (Tr. p. 81). The plaintiff then posted a forthcoming bond with the marshal to reobtain its property from his custody (Tr. pp. 93-95) and prepared to fight Porter's claims to a finish (Tr. pp. 81-82).

On December 27, 1920, Porter again procured an attachment against the plaintiff, this time in action number 16,452 (Tr. p. 110), and the plaintiff again obtained possession of its property by posting a bond with the marshal (Tr. pp. 96-97).

The foregoing are the two attachments involved in the cases at bar.[3]

The record shows that both Porter's attachments were ostensibly valid and that neither could have been defeated by motion or other direct proceeding to dissolve (Pl. Exh. 1, Tr. pp. 35-37; Pl. Exh. 2, Tr. pp. 58-66). The plaintiff was able to reobtain possession of the attached property by posting with the marshal the forthcoming bonds already mentioned, but it could not rid itself of the attachments except by successfully defending Porter's suits on their merits. It is on this ground that the plaintiff claims, as damages caused by the attachments, the attorneys' fees which it expended in such defense.

At the trial the defendants contended that the services of the plaintiff's attorneys were rendered, not in defeating Porter's claims, and so vacating the attachments, but solely in establishing the plaintiff's own demands against Porter. The record shows, however, that the same evidence both won the plaintiff's case and defeated Porter's. That evidence would necessarily have been introduced even if the plaintiff had had no cross-demands. All five of the contracts were involved

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(3) In action number 16,430, the action involved in the present case against the Fidelity Company, the plaintiff, on its cross-complaint, had previously levied an attachment on Porter (Tr. p. 109). Subsequently the plaintiff levied three other attachments on Porter, one on its cross-complaint in action number 16,452 (Tr. p. 111), and one in each of its affirmative actions (Tr. pp. 111, 112). The plaintiff's attachment in action number 16,452 was levied after Porter's attachment (Tr. pp. 110-111), on which the Globe Company gave the bond here in suit. The defendants have not, up to this time, cited any authority to show that the plaintiff's attachments are material to the questions here involved, and these attachments, we think, need not be considered further.

in each of the two suits which Porter brought, and in which he levied his attachments (Tr. p. 77). The issue in those cases was exactly the same as the issue on the plaintiff's affirmative demands, namely, whether the cake was up to warranty. The witness Alfred Sutro conducted on the plaintiff's behalf the litigation against Porter, and he testified on these points as follows (Tr. pp. 76-77):

> "Q. Mr. Porter had, as I understand you, repudiated certain contracts at that time existing between him and the Java Cocoanut Oil Company, at the time you were first consulted?
>
> A. Yes.
>
> Q. And those contracts were the basis of the counterclaim and cross-complaint filed by the Java Cocoanut Oil Company through your firm in the four actions mentioned in this complaint involved here?
>
> A. I will answer that question by saying that they were the basis of Mr. Porter's two complaints against us; each one of the five contracts between Porter and the Java Company was involved in the two suits in which your company and Mr. Redman's company gave the bonds; and obviously we had to file counter-claims and cross-complaints in those suits because Porter had taken the cake under those contracts and had not paid for it, and we were permitted, as you know, under the Code, to file these counterclaims, because they arose out of the same transaction."

On the same subject he said (Tr. p. 87):

> "A. * * * We could not establish our cross-complaint, the facts of our cross-complaint, which in substance were that this cake was as represented in the contract, without disputing Porter in his contention that we had breached the warranty contained in the contracts in giving him

inferior cake—the same witnesses were used, all of the witnesses were used for that double purpose absolutely and necessarily."

And again (Tr. p. 105):

"Now, your Honor, I would like to state on redirect examination, in view of the cross-examination, that the defense of the suit that was brought by Porter, the two suits that were brought by Porter, involved practically absolutely, I am using the word advisedly, the same work that we did in prosecuting the counter-claims and cross-complaints which we filed in these suits, and the complaints which were filed in the other two suits that were brought against Porter; that there were many witnesses whom we interviewed, and while we only had 48 testify, we had a good many more in reserve. There was not one, that I recall, who was limited to any particular matter as to any one suit; in fact, at the very beginning of the trial Judge Dooling ruled that he would consider that we should treat the cake in all of these shipments as the same kind of cake, and that there was one question before the jury, and that was as to the quality of the cake involved in all of these shipments; and that in order to defeat Porter in his two suits, we necessarily had to offer facts which, if the jury believed them, as they did, as we proved to them, entitled us to prevail in all of the suits."

The total fee of the plaintiff's attorneys was $50,000, and the plaintiff has paid this sum in full (Tr. p. 102). The $50,000. was in payment for all services in the Porter suits, both in defending against Porter's claims and in prosecuting the plaintiff's cross-demands. The plaintiff's attorneys also rendered certain relatively minor services incidental to the Porter litigation; for instance, negotiations with one or two buyers of the

rejected cake and questions involving state and local taxation of the plaintiff's properties (Tr. pp. 100-102). For these incidental services no charge was made. Sutro testified (Tr. pp. 102-103):

> "A. * * * I told you that this $6,000 was paid February 27th; get this right, now. $5,000 April 15, $5,000 October 30, and that no charge was made for the various matters that I have mentioned outside of this litigation. But I mentioned them to you, because services were rendered to the concern, and Mr. Clements paid us $50,000 for services in this litigation as such, and the other matters we allowed to go by default, if you please, we did not make a charge for them. We considered the $50,000 as payment for the services in litigation between Porter and the Java Cocoanut Oil Company, and no charges were set up on our books for any other services.
>
> Q. Did you bill them?
>
> A. We did not bill them.
>
> Q. But in your books you charged it to this litigation?
>
> A. This litigation; it is credited to the Java Cocoanut Oil Company, and no charges were set up for services outside of this litigation. I simply mention this to you so that you will be set entirely right as to what transpired between that concern and ourselves. I may further say to you, I don't know whether you got it, that Mr. Clements told me if we could collect that judgment he would be very glad to pay us $100,000, because he had never seen better, more efficient or extensive work done.
>
> Q. In the procuring of the judgment?
>
> A. In the securing of the judgment."

No part of the total charge of $50,000. was specifically allocated to the defense of Porter's actions as distinguished from the other services in the litigation (Tr.

pp. 99-100). The amended complaints, however, allocated $25,000., or half the total fee, to such defense—$15,000. to the defense of action number 16,430, in which the Fidelity Company posted the attachment bond, and $10,000. to the defense of action number 16,452, in which the Globe Company gave its bond. The defendants stipulated, as we have pointed out, that these amounts were the reasonable value of the services of the plaintiff's attorneys in *defending* Porter's actions against the plaintiff *after* the levy of Porter's attachments. The stipulation by the Fidelity Company reads as follows (Tr. pp. 32-33):

> "(Title of Court and Cause.)
>
> It is hereby stipulated by and between the respective parties to the above-entitled action that the sum of $15,000 is the reasonable value of the services rendered *subsequent* to the 20th day of December, 1920, by Messrs. Pillsbury, Madison & Sutro as attorneys for plaintiff, *in defending the original action No. 16,430, referred to in the complaint herein, and consolidated action No. 16,430, in so far as the same relates to said original action No. 16,430.*
>
> Defendant makes this stipulation subject to the reservation that it shall not be construed as an admission by defendant that the facts stipulated to are admissible in evidence in this case, and defendant hereby objects to their admission upon the ground that they are irrelevant, immaterial and incompetent, defendant hereby stating that its position in this behalf is that the said services rendered by plaintiff's attorneys in the defense of such action were not rendered for the purpose of securing a release of the attachment levied by the plaintiff in the attachment suits, but for the purpose of defeating the claims asserted by said

plaintiff in this complaint in said action, and for the purpose of establishing the counterclaims asserted by the defendant in its answer in said action.

Dated: San Francisco, April 17, 1923.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff,
REDMAN & ALEXANDER,
Attorneys for Defendant."

The stipulation made by the Globe Company is the same, except that it refers to action number 16,452 and the amount stipulated to is $10,000. instead of $15,000. (Tr. p. 34).

Under the circumstances shown by the record, we submit that the attorneys' fees here sued for are damages for which the defendants are liable. Furthermore, we submit, the liability of the defendants is not impaired by the circumstance that the plaintiff recovered judgment on its cross-demands, or by the fact that it gave forthcoming bonds to secure possession, pending judgment, of the property seized by the marshal.

SPECIFICATION OF THE ERRORS RELIED UPON.

The specifications of error upon which the plaintiff relies on the writ of error in the action against the Fidelity Company are as follows (Tr. pp. 119-122):

I.

That the above-entitled court erred in ordering, in rendering and in entering the final judgment herein dated April 28, 1923.

II.

That said court erred in not ordering, rendering and entering judgment for and in favor of the plaintiff in the sum of $16,591.64, together with interest on the sum of $1591.64 at the rate of seven per cent per annum from the 8th day of December, 1921, and for its costs of suit, as prayed in the amended complaint herein.

III.

That the court erred in holding, adjudging and determining that said plaintiff was entitled to judgment only in the sum of $1591.64, with local legal interest from December 8, 1921, and costs herein, and in not holding, adjudging and determining that plaintiff was entitled to judgment for attorneys' fees upon the second cause of action in the amended complaint herein.

IV.

That the said court erred in holding, adjudging and determining that said plaintiff was not entitled to recover attorneys' fees upon the second cause of action in the amended complaint herein, and in not ordering and entering judgment in plaintiff's favor for such fees.

V.

That the facts found by said court are insufficient to support the judgment herein, in so far as said judgment is that plaintiff do not have and recover attorneys' fees upon the second cause of action in the amended complaint herein.

VI.

That the said court erred in holding, adjudging and determining that the security, given the United States marshal by the plaintiff to relieve its property from the attachment in said second cause of action referred to, discharged the said attachment.

VII.

That the said court erred in holding, adjudging and determining that plaintiff, not having segre-

gated said attorneys' fees for services due to said attachment from those due to the trial of the action in which said attachment issued, cannot recover for them.

VIII.

That the said court erred in holding, adjudging and determining that attorneys' fees mentioned in the second cause of action of the amended complaint were not recoverable by plaintiff because they were not damages sustained by plaintiff by reason of said attachment.

IX.

That the said court erred in holding, adjudging and determining that services by plaintiff's attorneys to dispose of the action No. 16,430, in the amended complaint mentioned, and the merits thereof, were not "by reason" of said attachment.

X.

That the trial court erred in admitting in evidence over plaintiff's objection and subject to plaintiff's exception the bond given the United States marshal by this plaintiff to release its property from attachment in action No. 16,430, mentioned in said amended complaint.

XI.

That the trial court erred in admitting in evidence over plaintiff's objection and subject to plaintiff's exception the bond given the United States marshal by this plaintiff to release its property from attachment in action No. 16,452, mentioned in said amended complaint.

XII.

That the trial court erred in admitting in evidence over plaintiff's objection and subject to plaintiff's exception the judgment-roll and all the papers in the consolidated action No. 16,430, mentioned in said amended complaint.

The plaintiff's specifications of error in the action against the Globe Company are the same as the foregoing, so far as questions of law are concerned. We will, therefore, not print them at length, but respectfully refer the court to the foregoing and also to the assignments of error in the Globe Company case, which are printed in the record (Tr. pp. 170-173).

ARGUMENT.

FIRST: THE ATTORNEYS' FEES PAID BY THE PLAINTIFF IN DEFENDING PORTER'S ACTIONS ON THE MERITS ARE DAMAGES FOR WHICH THE DEFENDANTS ARE LIABLE.

A. The Authorities. The bonds in suit (Tr. pp. 8, 145) were both posted under Section 539 of the California Code of Civil Procedure. That section provides in part as follows:

> "Before issuing the writ (of attachment), the clerk must require a written undertaking on the part of the plaintiff, * * * with sufficient sureties, to the effect that *if the defendant recovers judgment,* the plaintiff will pay all costs that may be awarded to the defendant *and all damages which he may sustain by reason of the attachment,* not exceeding the sum specified in the undertaking * * *" (italics ours).

The statute thus imposes liability for damages on the surety "if the defendant recovers judgment". The sole question, therefore, to be determined is whether the attorneys' fees claimed by the plaintiff are damages "by reason of the attachments". This question, since it involves the construction of a state statute, depends upon

the state law, if the state law can be ascertained (*Fidelity & Deposit Co. of Maryland v. L. Bucki etc. Lumber Co.,* 189 U. S. 135, 137).

So far as we are advised, there is no California decision definitely settling the question here involved, though the point has been raised in several California cases. The first of these cases was *Heath v. Lent,* 1 Cal. 410, decided in 1851, long before the adoption of the codes. The State Supreme Court there stated that "counsel fees constitute no part of the damages for a wrongful attachment" (p. 412). Two years later, in *Ah Thaie v. Quan Wan,* 3 Cal. 216, the question of attorney's fees as damages again arose, this time in a suit on an injunction bond. The court definitely and expressly overruled *Heath v. Lent,* and held that the fees sued for could be recovered.

The precise question, whether attorney's fees expended in dissolving an attachment valid on its face, by defeating on its merits the suit in which the writ issued, was raised in *Elder v. Kutner,* 97 Cal. 490, 32 Pac. 563. The plaintiff there sued on an attachment bond, setting up as a second cause of action a claim for such attorney's fees. The trial court sustained a demurrer to this count. The Supreme Court held that an attachment bond under Section 539 of the Code of Civil Procedure is

> "a contract to indemnify the defendant for all costs that may be awarded to him, and all damages which he may sustain by reason of the attachment, in the event of his recovering judgment" (97 Cal. 493).

The court decided, however, that the trial court had properly sustained the defendant's demurrer to the plaintiff's count for attorney's fees, for the reason that the plaintiff had only alleged that he had "incurred" the fees, not that he had paid them. *This was the sole ground of the decision.* "The damage", the court said, "accrues from the payment and not from incurring the liability so to do" (97 Cal. 495). On this point, we may add, the court only applied the rule which had been settled in California many years before; that no item of expense can ordinarily be recovered on an attachment or injunction bond unless it has been actually paid (*Wilson v. McEvoy,* 25 Cal. 169, 174; *Prader v. Grimm,* 28 Cal. 11, 13; *Roussin v. Stewart,* 33 Cal. 208, 212). The court, in *Elder v. Kutner,* did not intimate that the plaintiff's count for attorney's fees was insufficient in any other particular. On the contrary, it specifically pointed out that *Heath v. Lent* (supra, p. 21) had been overruled (97 Cal. 494), and under the rule stated in *Heath v. Lent,* of course, the fees could not have been recovered at all. The plain intimation in *Elder v. Kutner* is that the plaintiff could have recovered the attorney's fees if he had actually paid them. In the cases at bar the plaintiff has paid the fees for which it sues (Tr. pp. 69, 100, 102). Clearly, therefore, we submit, the law in California appears to be that a plaintiff, under circumstances such as prevail in the cases at bar, is entitled to recover.

In a number of other states the question, whether the surety on an attachment bond is liable for attorney's fees for defeating on the merits the claim underlying an ostensibly valid attachment, has been definitely settled in the affirmative; the rule, by the weight of authority, is that, under such circumstances, the surety must pay the attorney's fees.

Before discussing the cases just mentioned we call the court's attention to two preliminary considerations. First, each of Porter's two attachments was regular on its face (Tr. pp. 8, 145); neither could have been dissolved except by a trial on the merits. Under well settled rules, therefore, the liability of the defendants is not affected by the circumstance that the plaintiff made no formal motions to vacate or dissolve the attachments (*Moseley v. Fidelity Co,.* 33 Idaho 37, 189 Pac. 862, 865; *Parish v. Van Arsdale Brokerage Co.*, 92 Kan. 286, 140 Pac. 835, 837; *Balinsky v. Gross*, 72 Misc. 7, 128 N. Y. S. 1062, 1063; *Straschitz v. Ungar*, 153 N. Y. S. 118). Second, the defendants admitted at the trial that an attachment surety is liable for attorney's fees spent in procuring the dissolution of the attachment. It clearly follows, therefore, we think, that the surety should be liable for attorney's fees spent in a successful defense on the merits, where, as here, the attachment could not have been otherwise dissolved. That the surety is liable under such circumstances is, we submit, clearly shown by the cases.

Gregory v. United States Fidelity & Guaranty Co., 105 Kan. 648, 185 Pac. 35, was, in many respects, strikingly

similar to the cases at bar. There a corporation, the Harbor Business Blocks Company, brought two actions on promissory notes against one Elizabeth Gregory. She joined issue on the Harbor Company's claims and filed a cross-petition to recover payments which she had made on other notes. The cases were consolidated and tried. Mrs. Gregory prevailed on the merits, defeated the Harbor Company's claims and recovered on her own cross-demand. During the litigation the Harbor Company had levied an attachment and posted an attachment bond similar, in all essential respects, to the bonds in the cases at bar. Mrs. Gregory sued the surety on this bond to recover damages, including fees paid her attorneys for services touching the merits of the consolidated suit. The court pointed out that the plaintiff could not have dissolved the attachment except by a favorable judgment on the merits, and held that the attorney's fees, therefore, were damages by reason of the attachment. It made no difference, the court said, that the plaintiff might have defended the suit, even if no attachment had been levied. The court said (135 Pac. 38):

> "By their findings the jury allowed plaintiff $1,250 for attorney's fees, reasonably paid in procuring the discharge of the attachment, $800 for expenses in procuring evidence to discharge the attachment, $40. traveling expenses necessarily incurred in attending court. It is contended that these costs and expenses were not occasioned by the attachment. The argument is that, the attachment being a mere ancillary proceeding, it must be assumed that the plaintiff would have paid out just as much for the purpose of establishing her

> defense against the promissory notes and for the purpose of recovering upon her cross-petition (which was for the amount she had paid upon previous notes) as if there had been no attachment levied. Perhaps this is true, but in order to have the attachment dissolved it was necessary for her to establish the fact that she was not indebted upon the cause of action sued upon, and the same evidence also established her right to judgment for the cancellation of all the notes, and for the other relief granted. The defendant's contention in this respect is fully answered by the decision in Parish v. Brokerage Co., 92 Kan. 286, 140 Pac. 835, where it was held that expenses necessarily incurred in procuring the dissolution of an attachment wrongfully issued, and the release of property unlawfully seized, including attorney's fees and the cost of depositions may be recovered by the owner in an action on the attachment bond."

In *Wilson et al. v. Root et al.*, 43 Ind. 486, the plaintiffs sued the sureties on an attachment bond to recover, among other things, attorney's fees for services relating to the merits of the attachment suit. The defendants claimed, like the defendants here, that "the damages sustained by the plaintiffs grew out of the action * * * against them and their defense of the same, and not out of the attachment or the defense of the same" (p. 489). The court held that, since the attachment could not have been dissolved without a trial on the merits, the plaintiffs were entitled to recover the attorney's fees. The court said (p. 493):

> "There may be different results in an action in connection with which an attachment has been sued

out: 1st. The action and the attachment may both be sustained; in which case there can be no suit upon the undertaking. 2d. The action may be sustained, and the attachment may not be sustained, but may have been wrongful and oppressive; in which case it would seem that the attorney's fees for defending against the attachment should be allowed in an action on the undertaking, but not those for defending the action. 3d. When the action and the attachment have both been defeated, there having been no foundation for the action, and consequently no right to sue out the attachment; in which case it seems to us that there can be no distinction made between services rendered in the defense of the action and those rendered in defense of the attachment. In such a case we think the reasonable attorney's fees of the defendant in the action in which the attachment was sued out, for defending both the action and attachment, may be included in the damages allowed in a suit on the undertaking."

A like ruling was made in *Crom v. Henderson,* 188 Iowa 227, 175 N. W. 983. The court said in part (175 N. W. 988):

"While it is true that it has been said by this court, and is the law, that one can only recover those attorney's fees which have been expended in defending against the attachment, the fact that the defense goes to the merits does not, of itself, defeat the right to attorney's fees, if the defense made strikes at the very root of the right to the attachment. Where a defense is made on the counterclaim, based upon the fact that there was nothing due the plaintiff at the time the suit was brought, and that the plaintiff had no reasonable ground for believing that there was anything due, the proof of these two facts sustains the claim that the attachment was wrongfully sued out. The

> fact that the same proof operates both to defend against the suit and to prove that the attachment was wrongfully sued out does not militate against the right of the plaintiff to recover attorney's fees for defending against the attachment."

In *Straschitz v. Ungar*, 153 N. Y. S. 118, the court, in allowing attorney's fees as damages in a suit on an attachment bond, said (p. 118):

> "It is well settled that, where the trial of the action is rendered necessary to dissolve an attachment, the expenses of the trial are recoverable."

In each of the following cases it was likewise held that the surety on an attachment bond is liable for attorney's fees for defeating the attachment plaintiff on the merits, if the attachment was regular on its face and could not have been dissolved except by judgment on the merits. See

ALABAMA:

Street v. Browning, 205 Ala. 110, 87 So. 527, 528.

GEORGIA:

Oakes v. Smith, 121 Ga. 317, 48 S. E. 942;
Collins v. Myers (Ga. App.), 117 S. E. 265, 266.

IDAHO:

Moseley v. Fidelity etc. Co., 33 Idaho 37, 189 Pac. 862, 864-865.

INDIANA:

Wilson et al. v. Root et al., 43 Ind. 486; supra pp. 25-26.

Iowa:

Whitney v. Brownewell, 71 Iowa 251, 32 N. W. 285, 287;

Union Mill Co. v. Prenzler, 100 Iowa 540, 69 N. W. 876, 879.

Kansas:

Parish v. Van Arsdale etc. Co., 92 Kan. 286, 140 Pac. 835, 837.

Louisiana:

Jones v. Doles, 3 La. Ann. 588, 589;

Bonner v. Copley, 15 La. Ann. 504, 505.

Missouri:

State v. McHale, 16 Mo. App. 478, 483;

State v. Coombs, 67 Mo. App. 199, 203 (overruled on another point, *State v. Fargo,* 151 Mo. 280, 52 S. W. 199);

State v. Thomas, 19 Mo. 613;

State v. Beldsmeier, 56 Mo. 226.

New Mexico:

Territory v. Rindscoff, 4 N. M. 363, 20 Pac. 180.

New York:

Holly v. Rosenstein, 94 Misc. 292, 158 N. Y. S. 226-228;

Cook v. National Surety Co., 169 App. Div. 656, 155 N. Y. S. 493, 494;

Balinsky v. Gross, 72 Misc. 7, 128 N. Y. S. 1062, 1063;

Ives v. Ellis, 35 Misc. 333, 71 N. Y. S. 971, 972 (Aff. 67 App. Div. 619, 73 N. Y. S. 1137);
Tyng v. American Surety Co., 69 App. Div. 137, 74 N. Y. S. 502, 503 (Aff. 174 N. Y. 166, 66 N. E. 668).

B. The Cases Cited by the Trial Court. The only case cited by the trial court holding that attorney's fees for services in dissolving an attachment regular in form, by defeating the attachment suit on its merits, are not damages recoverable on an attachment bond, is *St. Joseph Stock Yards Co. v. Love,* 57 Utah 450, 195 Pac. 305. That case, we contend, is not a sound precedent; it is contrary to the weight of authority, and rests, we submit, upon an incorrect analysis of the authorities.

The Utah court based its decision upon the case of *Northampton National Bank v. Wylie,* 62 Hun. 146, 4 N. Y. S. 907. The rule in New York, however, is settled by a series of later decisions, that where a trial on the merits is necessary to dissolve an attachment, then attorney's fees for services touching the merits can be recovered as damages on the attachment bond *(Holly v. Rosenstein,* 94 Misc. 292, 158 N. Y. S. 226-228; *Cook v. National Surety Co.,* 169 App. Div. 656, 155 N. Y. S. 493, 494; *Balinsky v. Gross,* 72 Misc. 7, 128 N. Y. S. 1062, 1063; *Ives v. Ellis,* 35 Misc. 333, 71 N. Y. S. 971, 972 (Aff. 67 App. Div. 619, 73 N. Y. S. 1137); *Tyng v. American Surety Co.,* 69 App. Div. 137, 74 N. Y. S. 502, 503 (Aff. 174 N. Y. 166, 66 N. E. 668);

Straschitz v. Ungar, 153 N. Y. S. 118). In so far, therefore, as the *Northampton Bank* case stands for the rule to which the court in the *Love* case cited it, it must, we think, be regarded as overruled by the later decisions.

We have already called attention to the long line of Iowa cases upholding the rule for which we contend. In the *Love* case the Utah court referred to the Iowa cases, but went on to say that they were based upon a special statute providing, in express terms, for the allowance of attorney's fees (195 Pac. 308-309). The court then quoted Section 3887 of the Iowa code, but quoted it apart from its context and construed it incorrectly. That section had nothing whatever to do with the Iowa cases, which, according to the *Love* case, were expressly based upon it. It is true that the section provides for attorney's fees, but not for attorney's fees spent in defending the attachment suit. It allows attorney's fees as costs in a suit against the surety on the attachment bond, to recover damages, including attorney's fees. To illustrate: If there were a California statute corresponding to Section 3887 of the Iowa code, then this plaintiff would be entitled, under such statute, to the fees of its attorneys in prosecuting the cases at bar, that is to say, in these actions against the sureties to recover damages on the attachment bonds.

The purpose and effect of Section 3887 of the Iowa code was pointed out in *Peters et al. v. Snavely-Ashton,*

144 Iowa 147, 122 N. W. 836. The Supreme Court of Iowa there said (p. 836):

> "There is some confusion in our cases upon this subject, due to what we now believe to have been a misapprehension of the effect of section 3887 of the Code. We have said in some of these cases that attorney's fees are to be fixed by the court, and are not to be considered by the jury in awarding the damages. Dickinson v. Athey, 96 Iowa, 363, 65 N. W. 326; Porter v. Knight, 63 Iowa 365, 19 N. W. 282. But in each of these cases the only question was the allowance of attorney's fees to be made under that section, *which are to be allowed, as we now think, as part of the costs, not for defending against the attachment, but for the prosecution of the action on the bond,* either in an original proceeding or by way of counterclaim. The statute itself provides that defendant shall be allowed the actual damages sustained and reasonable attorney's fees to be taxed by the court. *The attorney's fees here mentioned are not the damages for securing the release of the attachment, but are allowed as part of the costs of the action to recover the damages.* This is the only theory upon which such attorney's fees may be fixed by the court. They are not a part of the original damages; for, if they were, a jury and not the court would have power to fix and allow the same. Weller v. Hawes, 49 Iowa 45; Porter v. Knight, 63 Iowa 365, 19 N. W. 282. These attorney's fees are not to be considered as part of the damages. *In the action on the bond we are constrained to hold that attorney's fees for securing the release of the attachment, or of the attached property, may properly be considered as part of the damages sustained by the attachment defendant.* * * *
>
> *If, then, attorney's fees may be allowed as an item of actual damages, it is clear that the section of the Code has no reference to these, but to*

attorney's fees for prosecuting the action on the bond."

The foregoing clearly shows that the Iowa cases heretofore cited were not based upon express statutory provisions, as the Utah court in the *Love* case said. They were, as the opinions plainly state, based upon the principle that, where a defense on the merits is necessary to vacate an attachment, then the costs of such defense, including attorney's fees, are damages caused by the attachment.

Under the circumstances, we submit, the *Love* case is not a sound authority and does not support the judgments of the trial court in the cases at bar.

The trial court also referred, in support of its decision to the case of *Fidelity & Deposit Co. of Maryland v. L. Bucki etc. Co.,* 189 U. S. 135, as "fairly analogous in facts and principle" (Tr. p. 25). That case, we submit, so far as it is in point, supports our contention. The attachments involved in that case were intrinsically irregular and had been dissolved by a direct proceeding to that end. The attachment defendant sued on the attachment bond to recover the fees it had paid its lawyers for services in the dissolution proceedings. The jury awarded $7500. for such fees. The trial court held the allowance improper, but the Circuit Court of Appeals for the Fifth Circuit reversed the judgment (109 Fed. 394). The ruling of the Circuit Court of Appeals was affirmed by the Supreme Court. The *Bucki* case, therefore, is a case in which attorney's fees in a substantial amount, $7500., were awarded as dam-

ages on an attachment bond. The precise question, however, whether attorney's fees with respect to the merits can be recovered on such a bond was not involved or mentioned in the *Bucki* case. There the attachments were dissolved independently of a trial on the merits.

The trial court also referred to the case of *Alaska Improvement Co. v. Hirsch*, 119 Cal. 249, 47 Pac. 124, 127. That was a suit on a preliminary injunction bond. In upholding a judgment on the bond Department Two of the Supreme Court of California said, in effect, that attorney's fees paid for defending an injunction suit on its merits cannot be recovered from the sureties.[4]

We submit, however, that preliminary injunction bonds are not analogous to attachment bonds. Even if it were the rule that attorney's fees for defeating a final injunction cannot be recovered as damages on a preliminary injunction bond, that, we submit, would not make against the contention of the plaintiff here. The right to an injunction does not necessarily follow the establishment of a cause of action. The plaintiff may be entitled to relief, but not entitled to an injunction. Injunctions, therefore, can be and often are dissolved independently of the defendant's prevailing on the merits of his case. On the other hand, *an*

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(4) In this case a rehearing was granted, and the Supreme Court of California, in Bank, dismissed the suit on the ground that the bond was not supported by a consideration. The statements in the department opinion concerning attorney's fees, therefore, were no part of the final decision.

attachment valid on its face cannot be dissolved except by a successful defense on the merits.

Furthermore, in purpose and effect a preliminary injunction is diametrically opposite to an attachment. The whole purpose of a preliminary injunction is to *prevent* irreparable injury. It keeps matters as they are, pending determination of the merits of the controversy. The court issues a preliminary injunction only on notice and after ascertaining the balance of convenience between the parties (*Magruder v. Belle Fourche etc. Assoc'n.*, 219 Fed. 72, 82; *American Smelting Co. v. Bunker Hill etc. Co.*, 248 Fed. 172, 182). An attachment, on the other hand, forcibly and arbitrarily disturbs existing conditions without reference to the merits of the claim on which it is based. It deprives the defendant of his property during the whole pendency of the suit; it interrupts his business and reflects on his credit; and all this is done on the unsupported say-so of the plaintiff.

Some of the above mentioned distinctions between injunction bonds and attachment bonds were pointed out in *Territory v. Rindscoff*, 4 N. M. 363, 20 Pac. 180, which holds that cases disallowing attorney's fees in suits on injunction bonds are not authority in suits for attorney's fees on attachment bonds. The plaintiff there had sued on an attachment bond, and the court decided that, since the attachment was ostensibly valid, reasonable attorney's fees paid in defending the suit were damages by reason of the attachment. The court said (p. 181):

> "In the attachment suit, after the levy of the writ, the custody of the property changes. This remedy is aggressive, and ordinarily more directly injurious and damaging than the defensive process of injunction. In the attachment proceedings, where the writ is levied upon the personal and movable property of the defendant, he is put in a great peril of injury, and a necessity at once arises for prompt action and professional aid to prevent threatened ruin. In a proceeding by injunction, except in a rare case, where the writ is mandatory in character, the possession of the property does not change from the person in possession to the opposite party, or to that of the law, while in the hands of the officer. Again, ordinarily, the writ, if injunction, is sought and obtained only in aid of some equity for relief contained in the bill. While it is true that the attachment writ serves in some measure relatively the same office to a suit at law a writ of injunction does to a suit in equity, both being auxiliary writs, the same reason does not apply with equal force to confer a right to a reimbursement, for the reason above stated."

We submit that the authorities cited by the trial court do not support its conclusion that attorney's fees paid in respect to the merits of an action cannot, under the circumstances here presented, be recovered upon an attachment bond (Tr. p. 23).

The trial court also stressed the argument that "Attorney's fees as costs or damages are not favored and are recoverable only when with clear support in contract or statute" (Tr. p. 25). We respectfully submit that this argument does not support the court's conclusion. In the first place, we submit, it would necessarily follow from such an argument that attorney's

fees could not be recovered at all upon an attachment bond; yet the trial court expressly pointed out that attorney's fees "paid in respect to the attachments" can be recovered (Tr. p. 23), and that such fees are "damages" covered by the bond. Clearly, therefore, we submit, fees with respect to the merits are likewise covered by the bond, if services on the merits are necessary to vacate the attachment.

In the second place, we submit, the argument under consideration takes for granted the very point in issue. The question is whether the attorney's fees in suit are "with * * * support in * * * statute" (Tr. p. 25) that is, whether they are damages under Section 539 of the Code of Civil Procedure. We contend that they are such damages; that when the California legislature authorized the recovery of "damages by reason of the attachment", it thereby authorized the recovery of the fees in suit. This contention, we submit, is not answered by the fact that the legislative intent might have been more clearly expressed *(United States v. Fisher,* 6 U. S. 2 (Cranch.) 358; *United States v. Healey,* 160 U. S. 136, 148; *Binney v. Chesapeake etc. Canal Co.,* 33 U. S. (8 Pet.) 201). As the Supreme Court said in the case last cited (33 U. S. 212):

> "It is not a well-founded objection to this construction of the act, that the most apt and appropriate phraseology to convey this meaning, has not been employed. The great object is, to ascertain the intention of the legislature; and there is certainly nothing in the language used, that is repugnant to the construction we have adopted."

SECOND: THE FACT THAT THE PLAINTIFF RECOVERED A JUDGMENT FOR AFFIRMATIVE RELIEF ON ITS CROSS-DEMANDS AGAINST PORTER DOES NOT IMPAIR THE LIABILITY OF THE DEFENDANTS ON THE ATTACHMENT BONDS.

The right to recover attorney's fees on an attachment bond is, we believe, clearly not impaired by the fact that the attachment defendant successfully maintained in the attachment suit a counter proceeding for affirmative relief. This was directly held in *Gregory v. United States Fidelity & Guaranty Co.*, 105 Kan. 648, 185 Pac. 35 (supra pp. 23-24).

The facts of the cases at bar, we submit, clearly show that the ruling in the *Gregory* case is sound and reasonable. The circumstance that the plaintiff had valid cross-demands against Porter in no way alters the essential consideration that only a successful defense on the merits could have rid the plaintiff of the attachments. This element, we contend—the necessity of a defense on the merits—under the cases already cited, fixes the defendants' liability for the fees in suit. The fact that the plaintiff not only made good its defense, but also, upon the very transaction asserted by Porter, recovered a half million dollar judgment against him, only emphasizes, we submit, the integrity of the plaintiff's position; it convincingly shows that the attachments should not have been levied in the first place, and that the defendants, in justice, should make good the damages caused by the writs.

The record shows, moreover, that the services which the plaintiff's attorneys rendered in the Porter litiga-

tion would have been the same, even if the plaintiff had had no cross-demands (Tr. pp. 76-77, 87, 105, quoted supra pp. 13-14). These services were directed to show that the plaintiff had supplied copra cake in accordance with its agreements. The quality of the cake was the decisive issue, both in Porter's actions against the plaintiff and on the plaintiff's cross-demands. The same evidence and the same services accomplished a double purpose; they overthrew the attachment suits, and at the same time established the plaintiff's claims to affirmative relief. Half the fees which the plaintiff paid its attorneys are, therefore, we contend, plainly chargeable to the defense of the attachment suits, by which defense alone the attachments could have been dissolved. The aggregate recovery prayed in the two cases at bar is half the total fee which the plaintiff paid. The defendants have stipulated that the amounts thus sued for are the reasonable value of the services rendered in *defending* Porter's suits *after* the attachments issued. Clearly, therefore, we submit, since the plaintiff asks only the reasonable value of services in defending against Porter's claims, as distinguished from services in prosecuting its own claims against Porter, the fact that the plaintiff interposed cross-complaints and counterclaims in the Porter suits in no way affects the liability of the defendants.

THIRD: THE FORTHCOMING BONDS WHICH THE PLAINTIFF POSTED WITH THE MARSHAL TO OBTAIN POSSESSION OF THE ATTACHED PROPERTY DID NOT DESTROY OR IMPAIR THE LIABILITY OF THE DEFENDANTS FOR ATTORNEYS' FEES ON THE ATTACHMENT BONDS.

The bonds by which the plaintiff obtained from the marshal the property which Porter had attached (Tr. pp. 93-95, 96-97) were admitted in evidence over the plaintiff's objections and subject to its exceptions (Tr. pp. 92, 95). We contend that the bonds did not impair the liability of the defendants in the slightest, and that the court, therefore, erred in admitting them. Its ruling on this point, we believe, is directly contrary to the decision of this court in *Anvil Gold Mining Co. v. Hoxsie,* 125 Fed. 724. That was an action on an attachment bond posted under the Alaska statute, similar in all substantial respects to the bonds of the defendants in the cases at bar. The defense was that the plaintiff had given a release bond in the attachment suit. The court held that this circumstance was not a defense and that the plaintiff, notwithstanding the release bond, could maintain an action on the attachment bond to recover costs and damages. The court said (p. 728):

> "It is the final judgment in the case that is to determine the liability of the obligors upon the attachment undertaking. But the appellees contend that the appellant, the defendant in the attachment suit, having given an undertaking for the release of the attachment under section 150 of the Alaska Code, has waived the right to raise the question whether the attachment was wrongful or without sufficient cause, or, as stated by the court below, the defendant waives all irregularities and defects

in the original attachment proceedings, and admits an estoppel in the attachment suit against the attachment sureties by giving the bail required by the statute. It may be admitted, for the purposes of this case, that when the defendant in an attachment suit under the Alaska Code gives the undertaking provided in section 150, he waives his right to question mere irregularities and defects apparent upon the face of the original attachment proceedings; *but it does not follow that he admits an estoppel as against a judgment in the attachment suit, where the cause of the attachment and the cause of action are the same.* The reason why the defendant in an attachment suit who gives an undertaking for the release of the attachment may be deemed to have waived his right to question the regularity and correctness of the attachment proceedings is because there is no practical method provided for afterwards determining in the progress of that case the question whether there were irregularities or defects in such proceedings or not. *The only issues left to be determined, after the release of the attachment, are those relating to the cause of action; and where, as in this case and under the statute under consideration, these issues are the same as the cause of attachment, they are necessarily determined by the judgment,* and all other questions may be deemed to have been waived. But this waiver extends no further, and there is no implied estoppel beyond that which appears upon the face of the attachment proceedings, and relating to such proceedings, that will deprive the defendant of the right to recover all costs he may have incurred and all damages he may have sustained by reason of the attachment, if it is finally determined that the plaintiff had no cause of action'' (italics ours).

This decision, in and of itself, we submit, clearly shows that the bonds given by the plaintiff to the

marshal are not material in the cases at bar. We may add, however, that the plaintiff here is in a much stronger position even than the plaintiff in the *Hoxsie* case. There the plaintiff had posted a bond to *discharge* the attachment, and the trial court thereupon, in accordance with the Alaska statute, had made an order discharging it (125 Fed. 729-731). The undertakings in the cases at bar were not "discharge" bonds; they were "forthcoming" or "redelivery" bonds, given under Section 540 of the California Code of Civil Procedure. In accordance with that section, they were given directly to the marshal (Tr. pp. 91-92) to take the place of the property. The marshal manifestly has no authority to "discharge" an attachment and Section 540 gives him none; it only provides for the *substitution* of a proper undertaking for the property seized under the writ.

The bonds themselves were simply undertakings to redeliver the sequestered property or pay its value should Porter recover judgment (Tr. pp. 94, 97).

We have found no case in California deciding the effect of a forthcoming bond under Section 540 of the Code of Civil Procedure upon the question before the court. The rule is definitely settled, however, under similar statutes, that such a bond does not vacate or discharge the attachment. The bond is simply substituted for the attached property, and the writ of attachment remains in full force and effect.

In the case of *In re Federal Biscuit Co.*, 214 Fed. 221 (C. C. A., 2nd Circuit), decided under the New York

statute, the court said with reference to a forthcoming bond like the bonds in the cases at bar (p. 224):

> "It is important to distinguish between the discharge of the lien of the attachment by the bond given to take its place and the vacation of the writ. The two things are quite distinct, and the District Judge apparently did not have his attention called to the distinction, and it was not clearly pointed out in the argument before us.
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> * * * * * * *
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> The discharge of the lien of attachment is one thing, the vacation of the writ is another. The discharge of the lien does not necessarily vacate the writ. See King v. Block Amusement Co., 126 App. Div. 48, 111 N. Y. Supp. 102 (1908), affirmed 193 N. Y. 608, 86 N. E. 1126. The question whether the writ shall be vacated is important as affecting the liability of the surety."

In *Dewey v. Kavanagh,* 45 Neb. 233, 63 N. W. 396, the court said (63 N. W. 397):

> "The execution of the bond provided for by said section 206 was not designed to have, nor did it have, the effect of discharging the attachments. The case and all its proceedings stood precisely as if such bond had not been given. *The only effect of the bond* was to have it take the place of the property" (italics ours).

Other cases to the same effect are:

Smith v. Packard, 98 Fed. 793, 797 (C. C. A., 7th Circuit);

Correy v. Lake, 6 Fed. Cas. No. 3253, p. 599;

Day v. McPhee, 41 Colo. 467, 93 Pac. 670, 674;

Chittenden v. Nichols, 31 Colo. 202, 72 Pac. 53, 54;

Drake v. Sworts, 24 Ore. 198, 33 Pac. 563, 564;

Schunack v. Art Metal Novelty Co., 84 Conn. 331, 80 Atl. 290, 292.

Plainly, we submit, so far as the questions here involved are concerned, the plaintiff was in exactly the same position after giving the release bonds as it was before it had given them. To rid itself of the attachments and of the liability on the bonds which it had assumed, because of the attachments, it had no choice except to pay its attorneys to defend Porter's suits on the merits.

CONCLUSION.

In conclusion, we submit that these are cases in which the plaintiff is justly entitled to the relief sought. The defendants voluntarily assumed the liability which the statute made a condition precedent to the issuance of Porter's writs of attachment. They admit that the amounts sued for are reasonable compensation for the services which the plaintiff's attorneys performed in defending the attachment suits. The evidence shows that, without the services of attorneys in such defense, the attachments could not have been dissolved.

Attachment, at best, is a harsh and arbitrary remedy. The statutory liability of attachment sureties was designed to restrain its use in aid of doubtful claims (*Bing Gee v. Ah Jim*, 7 Fed. 811, 814). The defendants, as professional sureties, were paid to assume this liability.

We respectfully submit that the judgments of the trial court with respect to attorneys' fees should be reversed.

Dated, San Francisco,
May 21, 1924.

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